



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 26, 2023

IN THE MATTER OF:

Appeal Board No. 626338

PRESENT: GERALDINE A. REILLY, MEMBER

In Appeal Board Nos. 626337, 626338, and 626339, the Appeal Board, on its motion pursuant to Labor Law § 620(3), has reopened and reconsidered the

decisions of the Administrative Law Judge filed August 3, 2022 which sustained the initial determinations holding the claimant ineligible to receive benefits, effective April 29, 2020 through April 18, 2021, January 24, 2022 through March 22, 2022, and April 18, 2022, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$6,840 in regular benefits recoverable pursuant to Labor Law § 597 (4); and an

overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$2,700 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by a total of 112 effective days and charging a civil penalty of \$1,431 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, parties were accorded an opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Our review of the record reveals that the case should be remanded to hold a hearing. Further evidence is needed to decide the issues of whether the claimant lacked total unemployment, whether the claimant

should be charged with the recoverable overpayment of regular and FPUC

benefits, and whether forfeit penalties should be imposed on the basis that the claimant made willful misrepresentations to obtain benefits.

Since the initial determinations were issued more than one year after part of the period covered by the determinations, further evidence is needed to determine whether the claimant knowingly made false statements when she certified that she worked "0" days during the weeks at issue. Towards this end, the claimant shall be confronted with her unemployment web applications for 2020, 2021, and 2022, indicating that she did not wish to have the handbook mailed to her, relevant screenshots advising the claimant of the requirement to read the claimant handbook, and pages of the handbook regarding reporting work, and what constitutes work. These pages shall include, but need not be limited to, pages 65-76, 83-91, 99, 101-102, 114-116, 117-119, and 120-122 of the file. The documents shall be received into evidence after the appropriate confrontation and opportunity for objection.

Additional testimony is also needed to determine whether the claimant lacked total unemployment during the periods at issue in the initial determinations. Specifically, with respect to the ineligibility period beginning April 29, 2020 through April 18, 2021 and the factual basis that the claimant was administering Paycheck Protection Program ("PPP") loans she received, the testimony is inconsistent and incomplete regarding the claimant's use of funds from the loans.

The claimant is therefore directed to produce documentary evidence in connection with her application for the PPP loans, including the applications themselves, and to produce specific information and documentation to provide a complete and exact accounting of how and when the PPP funds she received were utilized by her as business owner. This documentation shall include, but not be limited to, business bank account statements, check registers, and spreadsheets establishing when amounts were paid out, and what expenses were paid. Relevant documentation produced by the claimant shall be received into evidence after the appropriate confrontation and opportunity for objection.

The claimant should also be prepared to provide further testimony to establish her usual income from the business, and whether any part of either PPP loan received by the claimant was used to afford her compensation for income she lost. As part of the inquiry, the claimant should be questioned regarding the source of the quarterly wages from the restaurant that are reported on the application claimant information screens for her 2020, 2021, and 2022 claims,

and her statements on questionnaires in evidence as Exhibit 5, that her salary from the business was \$2,000 per week.

The claimant shall be questioned regarding her involvement with the operation of the business, both on and off season. Although the claimant's responses on the Department of Labor business questionnaires indicate that she is paid \$2,000 a week, there is insufficient evidence of the claimant's business activities. Further exploration of the claimant's involvement in the operation of the restaurant is needed to determine her employment status for all the periods at issue.

Finally, since the initial determinations relate to three different benefit years, and since the claimant testified that she did not remember whether she filed an unemployment claim in 2021, the "Application Claimant Information Screen" for the claim filed on April 12, 2021 (pages 128-131 in the file) shall be received into evidence after the appropriate confrontation and opportunity for objection.

The claimant is placed on notice that failure to produce the evidence directed herein may result in the hearing Judge or the Board taking an adverse inference against her, and deciding that the evidence not produced would not support the claimant's position.

Now, based on all of the foregoing, it is

ORDERED, that the August 3, 2022 decisions of the Administrative Law Judge be, and the same hereby are, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision on the issues of whether the claimant lacked total unemployment, whether the claimant should be charged with the recoverable overpayment of regular and FPUC

benefits, and whether forfeit penalties should be imposed on the basis that the claimant made willful misrepresentations to obtain benefits, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

GERALDINE A. REILLY, MEMBER